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By. of Ford for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. ~~234~~ 30.

THE RELOJ CATTLE COMPANY, APPELLANT,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, POINTS AND AU-
THORITIES, BRIEF AND ARGUMENT FOR
APPELLANT.

ROCHESTER FORD,
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Supreme Court of the United States

OCTOBER TERM, 1900.

No. 204.

THE RELOJ CATTLE COMPANY, APPELLANT,

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APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement of the Case, Points and Authorities, Brief and Argument for Appellant.

This suit was instituted in the lower court by the filing of the petition (Rec., p. 1) asking for the confirmation of the grant known as the San Pedro. The petition alleged that the grant was a complete and perfect title in fee, being a sale of land by authorized officers, and that it was recorded and complied in all respects with the provisions of the treaty. The proceedings leading up to the sale were instituted in March, 1821. The customary routine of survey,

appraisement, offers of sale, final auction, approbation of sale, and payment of the money into the treasury was followed, and the final title was issued on May 8, 1833, and record was made in the proper book of *Toma de Razon* (Rec., pp. 105-204).

Documentary evidence of deraignment of title was introduced, and also evidence to identify the various calls and landmarks set out in the record of the survey of the grant (Rec., pp. 18-53). As to the details and manner of survey, opposing evidence was offered on behalf of the United States (Rec., pp. 54-97).

The lower court held (Rec., p. 328) that the construction of the granting papers was that four sitios and no more were sold and paid for; that this made the grant one by quantity, and that the owners of the grant had secured from the Mexican government this amount, which had been located south of the international boundary line, and that this action was conclusive.

The petition was dismissed and the claim rejected. Claimant was allowed an appeal, and duly prosecuted the same to this court.

POINTS AND AUTHORITIES.

The papers show that the tract of land as originally surveyed was located almost entirely north of the international boundary line.

Such rights in the United States as were fixed at the time of the treaty could not be changed by any subsequent action of the Mexican authorities.

U. S. vs. Yorba, 1 Wall., 412, 423.

ARGUMENT.

This case seems to turn largely on the construction to be given to the survey as set out in the original title papers. It is contended by claimant that the survey started from a central point, while the government contends that only exterior lines were run.

If the central point can be fixed, then under the ruling of this court in *Ely's Administrator vs. The United States*, 171 U. S. 220 241, "the actual grant can be established by reducing each measurement therefrom to such an extent as to make the area that of the tract purchased and paid for."

The general custom, undoubtedly, was to survey grants from a central point, but it must be confessed that as to surveys custom does not throw any steady light. Most of the grants which have been passed on by this court were measured from a central point. The *Los Nogales de Elias*, however, was not. It did not even begin from a corner, but started from a point in the south line.

There are two considerations that seem to be entitled to great weight as supporting the center theory of this grant. One is that the papers, after giving the recital of the survey, state that with these operations there were "centered," "sentrizados" (Rec., p. 112, 15th line from bottom; also, p. 136, 2d line from top), four sitios. It does not seem reasonable to argue that this word means anything but "centered." There seems to be no other meaning that can be legitimately given to it in this connection. If this is its meaning, there appears to be a direct and unambiguous statement that the sitios were in fact centered by the survey, and if this is true, then the only point which can be taken as the center is the one described as the initial or starting point.

Again, the record shows that the appraising officers, "in consideration of the examination they had made with their

eyes and inspection of the lands by surveying them, valued the three first sitios at \$60 each and the remaining one at \$10" (Rec., p. 136).

This language has meaning under the theory that measurements were made from a central point and the tract divided off into four parts, each called a sitio. There could thus be the three first sitios, and also the remaining one; but if only exterior lines were run, what meaning have the words "three first sitios," and how could they be distinguished from "the remaining one"? Is not this language necessarily based on the fact that the sitios could be distinguished by the survey one from the other, three having such qualities (running water, presumably) as made them worth \$60 each and the remainder (without running water, presumably) being worth only \$10? •

In the Nogales grant there was no central point, but the land was appraised as a tract, as it was all dry. In the present case, as above shown, the land varied in quality. It was spoken of as being divided into four parts, three sitios of one kind and the remaining one of another.

In trying to arrive at the understanding that the parties had at the time, it is respectfully submitted, from the above considerations and what will follow, that their proceedings were based on a survey from a central point. In the examination of this case no arguments based on the refinements of grammar or of surveying seem worthy of consideration. These people were unskilled in mathematics. Their ideas of the points of the compass were often confused, the witness Tipton testifying (Rec., p. 102) that he had seen a great many Mexicans—and this is at the present day—who did not know the difference between the east and west. Even approximately correct estimates of courses and distances are unknown to most—perhaps it would be safe to say to all—uneducated Mexicans, even now. Those who have had occasion to trace on the ground the surveys as recited in these various grant papers have come to know that state-

ments of distance must be disregarded. At a time when there was no general system of surveying the public lands of Mexico—no townships, ranges, meridians, or sections that could be referred to—and every grant had to be specifically located so as to be capable of identification by its own calls and sometimes those of adjoining grants, it was simply impossible that course and distance could control. To illustrate: It would have been useless to survey, say, fifty cords on a level plain and designate the extremity by a monument of stones, because if such monument were washed away or removed from any other cause, there would be no way of identifying the place where it had been; but if the distance was ignored and the line lengthened till some specific point in the topography of the country was reached, such a point could be clearly described, so that it could be identified and remembered by illiterate people, and it would for all time remain as a satisfactory landmark of the tract. It should occasion no surprise, therefore, if it is found in all these grants that computations of distances and areas constantly fall far short of the facts as developed by later and accurate surveys. Regarding the inaccuracy of Mexican surveys, this court said in *U. S. vs. Billings*, 2 Wall., 444, at page 447: "Perhaps the province of California at that time (1839) could not furnish a man capable of making an accurate survey;" and this was doubtless just as true of the province of Sonora in 1841; and the court said in *Noe vs. U. S.*, 1 Hoff Land Cases, 162, 169, referring to an estimate of the contents of a tract of land: "This is perhaps as close an approximation to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land formed by the former inhabitants of this country." It is notorious that the quantity of land within the natural boundaries of Mexican grants often far exceeded the estimate of the surveyor, but this circumstance could not restrict the language of the grant

or change the boundaries or the intention of the parties (*White vs. Burnley*, 20 How., 247).

That this grant was located and occupied and at least one boundary line, the one on the north, commonly known and recognized, appears from the history of the times. In the *San Rafael del Valle* grant, which was before this court in *Camou vs. The United States*, 171 U. S., 277, the title paper states that the measurement from the center of that grant to the south "ended at the limits of the *San Pedro* grant, land belonging to *Don Jesus Perez*," and the documents showed that his surveys extended up to that place, the monument of which standing there was taken "as the boundary of one and the other interested parties."

With these facts in mind, we come to an examination of the testimony in the endeavor to identify on the ground the calls of the survey as set out in the title papers.

Mr. George J. Roskrue testified (Rec., p. 18) that he had been four terms county surveyor of Pima county; several terms city surveyor of the city of Tucson; six years chief draughtsman in the surveyor general's office; three and one-half years chief clerk of the surveyor general, and a year and a half surveyor general. He further testified that he had located the northeast corner monument of the *San Pedro* grant on the bank of the *Cañada de la Bachata* (Rec., p. 19); that he had located what he had reason to believe was the center monument of that grant (Rec., p. 20), and testified that "I used my utmost endeavor to locate this grant as it was originally located by the Mexican government, and I am perfectly satisfied in my mind that that is the initial monument, and that the northeast corner is at the *Bachata cañada*" (Rec., p. 22).

Mr. Philip Cortzen testified (Rec., p. 24) that he had been an engineer, surveyor, and draughtsman for about nine years; that he was county surveyor of Pima county and a United States deputy land and mineral surveyor, and able to read and write the Spanish language fairly well.

This witness went fully and carefully into the details of the survey and of the map made by him and introduced in evidence (Rec., p. 24 *et seq.*). When the calls are located on the earth's surface it appears that they all tally, except that the distances are out in the first three calls. The papers show that the second call "ended in the valley itself near a little hill distant three cords" (Rec., p. 134). Mr. Contzen testified (Rec., p. 26) that he found in a valley, near a hillock, a pile of scattered rocks about 20 feet long, right close to the little valley. If it should be assumed that a transposition was made in the calls as to the first course, and that the second one should have been the first, then all the calls correspond as to natural objects and with reasonable certainty as to distance. This substitution would make the expediente read as follows:

"On the same day, month and year being on the spot and the interested parties having agreed in the presence of the fiscal agent and other officers, I ordered the erection of a corner monument and square, from which taking the direction from the southwest to the northeast, there were measured and counted fifty cords, the last ending in the valley itself near a hillock, distant three cords," etc.

With this change, the testimony of Mr. Contzen shows that the calls correspond upon the ground with the description given in the expediente. He goes into the details of the survey and identifies on the ground the various terminations of the lines as they are identified by the topography of the country. The call ending "in front of the Huachuca mountains upon a rocky hillock," the one "on a bushy tableland," the one "in the cañon or gulch of Bachata," and the others ending "in the middle of the valley of the San Pedro river," the one ending "after passing the river at the foot of a hill," the one ending "in the dry creek of Las Barras," the one ending "on a black mound," the one ending "at the descent of the Picacho," the one ending "in a thick forest," the one ending "in the dry creek of Del Malpais," the one

ending "at the ascending slope of a red table-land," and the one ending "on the same table-land, where I ordered put a corner monument," all these are identified by him (Rec., p. 24 *et seq.*).

More than this, he goes on to prove that the grant cannot be located elsewhere. The Picacho peak is the southeast corner of the grant, and Mr. Contzen testifies (Rec., p. 31) that there is not a similar peak within about 40 miles.

As opposed to this testimony, the government introduced the witnesses H. O. Flipper and William M. Tipton. Each of these gentlemen was called, so it seems, only to support a theory. That this statement is warranted is shown, we submit, by Mr. Flipper's testimony at the end of his cross-examination, as follows (Rec., p. 78):

"Q. Did you make an effort to locate that grant in Old Mexico? A. No, sir.

"Q. Did you make an effort to locate it in the United States? A. No, sir."

On reading all of his testimony the conclusion seems to be a fair one that it is of no value whatever as to any material matter of fact. His endeavor was, using his own language, "simply an effort to locate the original calls without any reference to their position on the surface of the earth" (Rec., p. 76).

"Q. With reference to that monument, where is this map or plat of survey as described in the original grant with regard to its position on the face of the earth? A. It may be in China or it may be in Sonora" (Rec., p. 76).

Further on the witness testified:

"This is the monument that the expediente says is on the Bachata cañon. I found the Bachata cañon and I found a monument there. I do not know whether the monument that I found is the one described in the expediente or not." (Rec., p. 76).

Mr. Flipper's theory led him to the extreme position indicated in the following testimony of his (Rec., p. 73):

"Q. What is the drain of the slope of the country? A. Northwest.

"Q. Then if Antunes and Salas had failed to agree upon the division of the water, how could Antunes have got his water? A. I do not know, unless he could make water run uphill.

"Q. Then if they actually entered into an agreement by which each man took a share of that water, Antunes could not get his water upon his land without carrying it? A. There was nothing said about what it was to be used for.

"Q. Do you know any method by which Antunes could have obtained any benefit? A. By having an arrangement for raising water.

"Q. He would have to raise the water? A. Certainly."

This would seem to evidence the unreasonableness of Mr. Flipper's theory and testimony in support of it. As a matter of course, the division of the waters of the marsh was effected so that each person could lead the water on his land by the force of gravity, in ordinary irrigation ditches. To suggest that this division of the water contemplated some arrangement for raising water is the most advanced position so far presented in the literature of the land-grant subject.

Mr. Flipper has testified for the government in all these cases except, perhaps, one, and always in opposition to the grants. What was plain to every other witness and plain to the members of the court of private land claims and to this court he has generally been unable to see. In the Sonoita grant, for instance (confirmed by this court in *Ely's Administrator vs. The United States, supra*), in relation to the topography, Mr. Flipper testified that this "induced me to believe that the country did not conform to the expediente absolutely in anything, in fact" (p. 45 of record in that case). He testified that "he went to the center monument, as claimed, and made a thorough examination of the vicinity there, and I was satisfied that was not the place" (p. 43 of

record in that case). The other witnesses, however, identified the same, and this court said in its opinion (171 U. S., 220, 241):

"In this case (the Sonoita) if it is possible to locate the central point from which, according to the report, the survey was made (and we judge from the testimony that it is possible)," etc.

Mr. Contzen's testimony is not controverted as to the facts. He testifies that he followed the calls and found monuments and natural objects answering clearly the description of the expediente. No one proved that he testified erroneously, or that the monuments and objects are not there. The government's witnesses, however, reversed the classic saying, and urged that "it is a theory that confronts us, not a condition." Mr. Tipton arrived at the following conclusion (Rec., p. 104):

"Q. If you could find absolutely every call in the expediente on the lines as laid out by Mr. Contzen, you still would not say that it could not be possible that the original survey was not made from the center? A. I have already made one answer, that it would not be correct."

That is to say, as it seems to us, these witnesses would disregard every fact, no matter if these facts absolutely prove the correctness of Mr. Contzen's survey, and would rely on their theory, though such theory is not supported by any facts. Mr. Tipton goes to the full extent of denying that the survey would be correct even though it were absolutely proved to be correct.

It is submitted that the initial monument designated in the expediente as "the erection of a corner monument and square" (Rec., p. 134) is the center monument, and that the lines drawn from it to the northeast, southwest, southeast, etc., corner there would be at right angles if properly drawn, and we rely, as above set out, on the testimony that such lines drawn from this central point will correspond to

the calls of the expediente, while there is no proof that any other theory is justified by the facts. If the government had assumed that a corner monument was the starting point, and had followed this with proof that the calls from such initial point can, in fact, be verified on the ground, this would unquestionably be entitled to as much weight as we are asking the court to give to the evidence adduced by plaintiff. But this is not done. So far as the record shows, the actual grant as originally surveyed can, in fact, be identified only as resurveyed by Mr. Contzen.

Much time was taken by the government in endeavoring to prove that the place petitioned for, as set out in the title papers, is the place now called San Pedro, which is south of the international boundary line.

As to all this we call the attention of the court to the fact that the petition of 1821 expressly states (Rec., p. 106) that there had been registered "el paraje despollado del rio abajo de San Pedro," which means a depopulated place on the river *below* San Pedro. On October 25, 1832, when report was made to the supreme government of the State, these proceedings are said to refer to "four sitios of land in the place named down the San Pedro river," and the order, dated October 31, 1832, for the issuance of title refers to "the four sitios surveyed at the locality named down the San Pedro river." It seems clearly to appear from an investigation of the language of the grant that the land denounced, surveyed, and sold was down the river, and therefore north of what was then known as San Pedro. The place called San Pedro was apparently not itself abandoned at the time of the survey, because the record speaks of the "survey from the house of San Pedro."

In further considering this survey we find that the San Pedro grant was located at a time when there was no other tract of surveyed land in that part of the San Pedro valley. For this reason, probably, it was surveyed with unusual

care and tied to the ground by an unusual number of calls for natural objects.

In fact, there are in the field-notes fourteen calls for natural objects, such as can be identified upon the ground.

In addition, fifteen stone monuments are called for, ten of which, as shown by the evidence, were found at the points described.

Usually the surveyor who seeks to locate a tract of land by boundaries described in a conveyance more than eighty years of age will think himself fortunate if he actually identifies two or three of the corners called for, and it is seldom we find more than a half dozen, at most, of the landmarks mentioned in any single description of land.

Nor is it in the number of calls only that these field-notes are exceptional. That the natural objects called for may answer the description given, they must be found in three certain lines, and also in the very order in which they are mentioned in the expediente. When a competent surveyor actually finds the calls in such a set of field-notes clearly and unmistakably answered at a certain place, we may be sure that he has found the very tract of land described.

The person who thinks that he can find such a number of natural objects and monuments in proper order and in lines as they are described at any other place cannot fully appreciate the difficulty of the task.

If we take only the center monument and two calls in the southwest course and two calls in the southeast course, these will alone locate the San Pedro grant with absolute certainty (Rec., p. 43).

The center monument, as the evidence shows, cannot be duplicated in the San Pedro valley. The thick grove or forest, called for at a point 50 cords to the southwest of this center monument, is also an unmistakable landmark, and the Arroya del Malpais was also a most satisfactory natural limit for the second call of 50 cords to the southwest. On the southeast course we find the first call ends in the middle

of the valley, and the second call of 50 cords crosses the river and ends at a monument at the crest of a hill.

If there were no other calls answered, we would be sure that here, and here only, can this tract of land be located.

When to these proofs we add twice as many more, almost equally conclusive, all doubt is removed, and the outer limits of the tract are defined with most satisfactory certainty.

It is urged by counsel for the United States Government that the field-notes (which we find so satisfactory when applied to the right tract of land) are so indefinite as to be almost worthless.

This view is based upon an examination of such field-notes *apart from the land*. A description can be tested only by being applied to the land described.

Many descriptions which are apparently correct when considered by themselves, are found to be worthless when applied to the ground. On the other hand, descriptions which seem ambiguous or erroneous to one who does not know the premises are often found perfect when applied to the land described.

One objection made is this: That the field-notes indicate a survey around the outer lines of the tract, and not (as we claim) from a center point.

This view is based upon the fact that the surveyor, after running a line of 250 cordeles, and after indicating that he has reached the end of such line and called for a corner monument, does not *say* that he returns to the center monument, but goes on to run another line.

He commences the next line by words equivalent to the word "thence," as used by surveyors of the present day.

It is true that in surveys made recently we understand that when the surveyor writes "thence" he means from the point where he left off. But this is purely a matter of custom. The Mexican conveyancer of eighty years ago, *knowing that it was the general custom of the time to survey from the*

center, construed each call of "thence" or "from there," when coupled with words indicating the direction, as meaning from the center monument.

He was not warranted in any other construction. It was not the custom to set the compass and give the direction of the line except when starting from the center monument.

Our claim of a survey from the center is, then, in accordance with the custom of that day, and does no violence to the language used.

Field-notes are always very concise, often abbreviated, and no one can safely interpret them unless he has full knowledge of the surveyor's modes of expression and the customs of the time.

It is asserted, further, that the words used at the end of each line of calls indicate that the line run was a *side* line.

We do not so understand them. We believe these words were merely intended to mean that at the end of the line he (the surveyor) had established a corner, from which, by running side lines, a square would be inclosed, etc.

This construction harmonizes with the custom referred to and also with the survey actually made.

It should be remembered that the description found in the expediente is partly the work of a copyist, who knew plenty of long words, but evidently had very little knowledge of surveying.

The surveyor himself knew what he had done, but could not tell whether or not the words used were fit to describe his work. Their description, *taken apart from the survey and the land*, might be considered ambiguous, and the style of the survey would be more or less in doubt.

But to a surveyor *on the ground*, there is no ambiguity. He finds abundant proof of what was done, with which the intended meaning of the field-notes is easily reconciled.

In the same way he easily corrects errors in the *directions* mentioned.

In Spanish the difference between east and west is so

slight (*este* and *oeste*) that they seem to have been used indiscriminately.

The calls for direction indicate correctly whether the course is *northerly* or *southerly*, but to determine whether the course run was northeast or northwest the surveyor must depend upon the landmarks called for.

This is no unusual thing in surveying. The rule requires the line to run to the corner or natural object called for, regardless of the direction mentioned. This relieves the case of any doubt.

On the ground it is seen that the call for the "forest," "Del Malpais," and the red mesa is bound to be southwest; that the line run to cross the river to the black mound and to the slope of the Picacho was certainly measured to the southeast, while the line run to "the river at the ford and rapids," and to the Bachata gulch, was surely run northeast. But, it is asked, when government experts were wandering up and down the San Pedro valley, ostensibly looking for this grant, why did they not find it?

The answer is easy. They did not really *try* to find it. There is only one way to locate a tract of land on the ground. It must be done with compass and chain, by careful work. There was one error in the field-notes, and possibly this, being at the very beginning, may have misled them.

The call given as the first in the northeast course runs 50 cordeles to the river at the ford and rapids. A careful examination shows that this was intended, not for the first call, but for the second, while the call interlined for the first was evidently copied in as the second call (and part of the third).

As proof of this it is only necessary to look at the surveyor's map of the grant. From it we see that there is a call lacking on the west side of the river; also that there is a call to spare on the east side.

And by carefully sifting out of the calls on the east side those that are correct, and which are clearly answered in

that part of the line, we find that this is left: "Monument in valley itself in front of the Huachuca Mts." This fits exactly as the limit of the first call of 50 cordeles northeast from the center monument.

There was then merely a transposition of calls, such as is often found in conveyances.

Usually it occurs from an *inserted* call, which in copying is misplaced. Probably the surveying party started and ran the northeast line from a point half way between the center monument and the ford and rapids, measuring four calls only.

To make out the distance (and to center the tract more to their taste), they put the center monument 50 cords further to the southwest, but in line with the work already done. This made it necessary to insert the call, which was misplaced, as before explained.

With this single error corrected, we find that the survey fits the ground with remarkable accuracy, and that the surveyor was even mindful of distance to a degree not often noticed in surveyors of that time.

Like many of his class, he had little knowledge of words, but he selected landmarks with such good judgment as many a bookish surveyor might envy.

Counsel for the government may argue that this grant cannot be located; but it is idle to discuss that point when it has been located.

They may argue, and prove (by blackboard exercises), that it may have been or might have been located in some other locality. Such proof, if proof it can be called, has no weight when placed in the scale against proof of location by accurate surveys and monuments found.

A survey which was carefully tied down by calls for fourteen natural landmarks, which are found and sworn to, and by fifteen monuments, of which ten are found and sworn to, cannot be dragged from its place by any amount of guessing or surmising, or even by the most brilliant crayon-work

which a vivid imagination may picture out on the black-board.

Counsel for the defense have introduced no evidence which should have weight as against the case made by claimant. The most that is shown by them is this: That certain government agents were sent out to locate the San Pedro grant and failed to find it.

But the evidence of these agents also shows that they did not search carefully for this survey *in the locality where it is claimed to be*, and where local traditions place it, and where it has been found by at least three competent and honorable surveyors.

A hundred people may search for a lost golf ball, but what is their evidence worth as against that of one man who actually finds the ball?

The defense seems to be scarcely more than suggestive of a theory, and that theory is only in effect that the San Pedro survey *may have been made* higher up the river than as claimed by plaintiff.

We insist that such a defense, in order to be worthy of any consideration, should be backed up by positive proof that the survey actually was located further south.

If their theory is correct they should be able to prove it by showing that the landmarks called for in our expediente are found, in proper order and as described in the field-notes, at some other place, and that they are not found, as we claim, on the tract of land in controversy.

They have not even attempted to disprove plaintiff's case, nor to prove another and different location of the grant.

It is claimed that the San Pedro survey was not made, as plaintiff contends, from a central point; that the directions as given in the field-notes are impossible, and the government agents, who were never over the lines of the survey and who were not familiar with the field-notes, can make nothing of them.

In answer we say that a survey from the center is to be expected, because it was the general custom of that time.

To assume that the survey was made on the side lines will make the San Pedro river run across the corner of the tract.

This is an absurd supposition. The survey is in a valley, and the river is proven to be nearly in the center of the valley.

A survey from the central monument, as claimed, covers 10 miles of the river and all the good land in that part of the valley. Considering the lines run *as side lines*, they would include not half so much of the river, and would miss much of the bottom land on one side of it. Rafael Elias was ignorant, perhaps, but he knew better than to take less of the river than was rightly his portion, or than to take worthless gravelly hills in place of rich bottom land.

But the conclusive argument against a survey by side lines is found when we apply the field-notes to the land claimed under them. No surveyor or other person who has been over this tract of land with these field-notes at hand has ever doubted that the survey was made from the center. The very large central monument proves it.

But one *large* monument is found. If surveyed about the sides we would expect to find one at each corner.

The *location* of this monument, near the center of the valuable land in the valley, also indicates that it marks the center and not a corner of the tract.

In locating the San Pedro grant we notice, *going a little more into details*, that two of the lines surveyed cross the San Pedro river. It cannot be moved east or west, because it is tied to the river. No one pretends that it can be located further north than its north line, as surveyed and claimed in this suit.

And this north line, so claimed, is only about 20 miles from the source of the river.

Hence this grant, being fully 10 miles in length north

and south, can be moved up the river barely 10 miles at the most.

In other words, there is a possible chance to locate only two surveys of the size of the San Pedro between the limits within which it is conceded that this survey was made, to wit, between the source of the San Pedro river and the Bachata gulch.

The surveyor's notes (Rec., p. 134) carefully describe a contention had, before the line was run, between Senor Antunez (or his attorney), who claimed to be in possession at or near the source of the river, and Elias, for whom the survey was to be made.

Antunez was willing to have the survey made "down the river," but claimed to be in possession there near the river's source.

To induce Elias to go further down, an agreement was made that in such case Antunez should not use all the water, but that the water of the marsh (*the permanent water of the river*) should be equally divided between them.

This agreement, as well as the field-notes of the San Pedro grant, show that the survey made for Elias was made "down the river." In other words, it is clear that a survey at the head of the river was left for Antunez, and as there is barely room for one such survey above the San Pedro as we claim it, this grant cannot be moved any further up the river without crowding out Antunez and doing violence to the surveyor's report.

As before stated, it cannot be moved down the river, because its north line has been practically established at the Bachata gulch, and no one has ever intimated that it could be placed further north. Hence, even without reference to other natural objects, the river alone and the preliminary agreement mentioned establish a strong probability that the San Pedro grant was located about where our surveyors found it.

Local tradition is also of great value in determining the

location of an old survey. In this case we find (Rec., p. 168) that in 1883 James M. Hall purchased that part of this San Pedro grant in Cochise county, Arizona, and paid for it the sum of \$20,000.

It is safe to assume that before making so large an investment he must have been well satisfied that a large part of the grant was in Cochise county, and at that time (17 years ago) it was easier to get evidence on this point, as his purchase was made of Manuel and Jose M. Elias, sons of the Rafael Elias who located the survey. There is also in evidence a contract for the conditional sale of this land, which serves to show that a large part of this grant was believed to be located also in Cochise county.

There are many other items of evidence, all of which tend to show that local tradition placed the San Pedro grant just where the surveyors who testified in the court below located it.

Upon the ground, standing at the center monument, remembering that the man for whom this tract was surveyed was a first settler and had his choice of the land, one is bound to admit that the monument centers the very tract which a first settler would be likely to select.

Referring to the field-notes (Rec., p. 134) and following the line to the southwest (the last call in the field-notes), he finds first (about $1\frac{3}{4}$ miles from the center monument) the grove of forest trees referred to as the limit for the first call of 50 cords.

This grove, as the evidence discloses (testimony of Contzen, Rec., p. 24 *et seq.*), is the only landmark of the kind for several miles up and down the river, and it alone identifies the center monument almost beyond dispute.

Proceeding further on this (southwest) line, all possible doubt is removed when he finds (about $1\frac{1}{2}$ to 2 miles beyond the grove) the "Arroya Malpais," a very rocky draw or dry creek, and still further on the same line a red mesa or tableland, the limit of the third call on this line.

This red mesa is also shown by the evidence to be unique, no other red soil being noticeable in that part of the valley.

This would seem to be sufficient ; but the surveyor, with quite remarkable foresight, adds to the certainty of his description by placing the limit of his last call on this (southwest) line on "the same red mesa."

To answer the calls in this line it then becomes necessary to find not only a red mesa, but one wide enough to be the limit of two separate calls, or at least $1\frac{1}{2}$ miles in width, and this mesa is shown to be a smooth table-land, and the southwest corner is found on "the same red mesa," on the ascending slope of which the third monument on this line is located.

This line, then, has in it but four calls of 50 cords each, and the total length of the line is correctly stated to be 200 cords.

It is noticeable that the two other lines surveyed are each 250 cords (5 calls). Why was this one made shorter ?

The reason for this is found in the fact that it ends at a little distance from the foot of a mountain, and that to continue even one-half of 50 cords would have carried the surveying party high up among the rocks, where no land of value was to be found.

Thus we have another proof that in tracing this line we have actually followed in the footsteps of the original surveying party. This being the last line run, they could not correct it without undoing all their work on the lines already run.

Returning to the center monument and taking from it a southeast course (the second course run as shown in the field-notes), the first 50 cords are said to end "in the middle of the valley of the San Pedro river."

This call is significant, in that it indicates that the *surveyor found no natural landmark near* ; hence he did the best he could, and called the point "in the middle of the valley," etc.

This call is satisfactory because it really ends on the smooth bottom land, where there is no landmark of any kind near at hand to which the call could be tied.

The second 50 cords on this (southeast) line call to cross the river and end at the "crest of a hill," which is the bluff on the east side of the river bottom. The river is crossed and the hill reached exactly as the field-notes state, and the crest of the hill is found at the proper distance, about $3\frac{1}{2}$ miles, from the center monument.

Next on this line we come to the monument at the dry creek, "Los Barros."

But the best landmark on this (southeast) line is the "black mound," mentioned as the limit of the fourth call (see Rec., p. 29). This is shown to be an unmistakable landmark, corresponding well with the expediente.

The last call on this line reaches "the slope of a peak," where is found a pile of rocks, the southeast corner of the grant.

Returning again to the center monument and taking a northeast course, we find the "ford and rapids" in the river are directly in line; also a monument "on a rocky hill," another on "a brushy mesa," and the northeast corner monument on the bank of a gulch, which, by reason of the "Bachata" bushes growing in it, is described as the "Bachata gulch."

But there was an error made in the field-notes here. The first call in this direction (50 cords) is said to end at the ford and rapids; whereas, *upon the ground*, we find the distance from the center monument to the ford is about double the distance usually traversed by this surveyor in measuring 50 cords—in fact, about four miles. In other words, this ford would naturally be the terminus of the *second* call, instead of the first.

Having observed the very fair degree of accuracy with which this surveyor measured distances, and the care taken to call for natural landmarks just where they may be found, we are at a loss to know how he could have made such an error at the very beginning of the survey. A careful study

of the field-notes on the ground explains this error, as before stated.

It appears that the first start was made from a point half way between the center monument, as claimed, and the ford.

This supposition makes the first call, as given, correct, ending at the ford.

The second call of 50 cords, to be correct, should end at the "monument on a rocky hill."

The third call ends on the "brushy mesa," and the fourth at the Bachata gulch.

These four calls were measured and recorded by the surveyor, and he states the distance run as 200 cords, which was at that time correct. It was the evident intention of the surveyor to have in each line five calls, making 250 cords.

But at the Bachata gulch, the land being nearly worthless, he cuts his line short at 200 cords.

Later, in order to make this line full 250 cords, it is decided to move the center point of the survey one call of 50 cords to the southwest.

To correct his notes in accordance with this change, the surveyor should have inserted a first call, ending in the valley at the point from which they set out.

This call we would expect to find exactly like that one which in the field-notes is found *on the east side of the river*, "in the valley itself in front of the Huachuca Mts."

Undoubtedly he did insert this call and it was misplaced. There were, then, in this line apparently three errors: A call is lacking on the west side of the river, a call which is not answered there is found on the east side of the river, and the length of the line is given as 200 when it should be 250 cords.

The theory of an inserted call accounts for all these discrepancies.

It accounts for the call short on the west side of the river and the call too much on the east side.

For when we find that the extra call on the east side is

"in the valley itself in front of the Huachuca Mts.," we are tolerably certain that this is the misplaced call, and that, to be as intended, it should be transposed to the west side of the river, where it would be really "in front of the Huachuca Mts."

On the east side it is in front of the Mule mountains, not the Huachucas.

The full length of the line was given as 200 cords, no doubt, before the center point was moved and the extra call inserted. As thus corrected, the northeast line is as satisfactory as the others, showing all the landmarks called for in proper line and at proper distances from each other.

And the fact that we are able with tolerable certainty to tell just how this line was run and to correct a clerical error in it by means of evidence found in the field-notes and upon the ground is of itself good evidence of the care with which this survey was made, and that we have found its true location.

Finally, it is not by considering by itself each detail of the evidence in this case that its real value may be determined. Each monument found helps to identify all the landmarks, and each landmark in turn assists in proving the genuineness of the monuments found.

The three lines of the survey made are found to converge to a central point, and at that point we find an ancient and satisfactory monument.

The lines thus prove the center monument, and the monument in turn sustains the lines as run, and all taken together (being fully in harmony with the field-notes at all points) prove a survey from the center, and that the landmarks and monuments found and the lines run are those indicated in the field-notes of the San Pedro grant.

It is speaking entirely within bounds when we affirm that a surveyor seeking to locate an old grant by landmarks and monuments called for in field-notes 80 years of age is not able once in a hundred times to find and identify the land

described with such satisfactory certainty as it is done in this case.

II.

If we are correct in our construction of this survey, that it was from a central point, then, according to the rule laid down by this court, as heretofore cited, "the actual grant can be established by reducing each measurement therefrom to such an extent as to make the area that of the tract purchased and paid for." The center monument, as testified to by the witnesses for the claimant, is north of the international boundary line, and the grant is therefore located almost wholly within the United States.

As to any proceedings in Mexico subsequent to the treaty, it is submitted that they are *res inter alios acta* as to the present proceeding. If anything had been done by Mexico prior to the treaty, it would doubtless be of binding force, but it seems clear that after Mexico has ceded territory to the United States she can do nothing further with regard to lands which have passed out of her territory and jurisdiction. If since the treaty Mexico has erroneously construed this grant and has located it south of the international boundary line, such action can constitute no estoppel against the claimant in this proceeding. Mexico can, of course, do as she pleases with her own territory. She can give it away. She may recognize as valid grants that we think invalid, and may locate such grants where and how she pleases, but such action does not bind the claimant in this present controversy.

As was said by this court in *U. S. vs. Yorba*, 1 Wall., 412-424:

"The rights of the inhabitants of the ceded territory to their lands depend upon the concessions made by the officers of the former government having at the time the requisite authority to alienate the public domain, and not upon any subsequent declaration of Mexican commissioners upon the subject."

If the title paper of a grant should show that the central point from which it was measured was located in Mexico, and in any proceedings subsequent to the treaty Mexican officials had declared that such central point was in the United States, it is at once apparent that as to this the officers and courts of our government would say that such action by Mexico could not bind the United States. We submit, in like manner, that the proceedings which have been gone through in Mexico cannot be availed of by the United States, and that the question to be determined in the case is, Where does the evidence adduced herein show that the central point was located?

It is submitted that a decision should be rendered confirming this grant according to the measurements from the central point, and that the decree of the lower court should be reversed.

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